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ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

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Appellee-Plaintiff.

June 23, 2008

BAKER, Chief Judge

Appellant-defendant Keith Coddington appeals his convictions for Criminal Confinement,¹ a class B felony, and Battery,² a class C felony. Specifically, Coddington argues that his convictions must be reversed because the prosecutor committed misconduct during closing arguments when he commented about Coddington's post-arrest silence and informed the jury that it should find Coddington guilty. Concluding that the prosecutor's comments did not rise to the level of fundamental error, we affirm the judgment of the trial court.

FACTS

Coddington and Patricia Hunter dated for several months in 2006, but she eventually ended the relationship. Following the breakup, Coddington wrote Hunter numerous letters in an attempt to get back together, but Hunter resisted his efforts.

On December 9, 2006, Coddington sent Hunter a text message while she was visiting a friend, indicating that he was going to "stop by" and talk with her. Tr. p. 203, 241-43. When Coddington arrived at Alma Mounts's residence in Richmond, Hunter was waiting outside without a coat because she did not intend to talk with Coddington very long. However, when Coddington asked Hunter to get into his truck because of the cold weather, she complied. Coddington then sped away and parked behind a building.

At some point, Coddington accused Hunter of "going out with other men" and he hit her in the face and ribs. Id. at 247-49. As Hunter attempted to exit the truck,

¹ Ind. Code § 35-42-3-3.

² I.C. § 35-42-2-1.

Coddington grabbed her neck and forced her back inside. Coddington began to drive away, and when he came to a stop, Hunter again attempted to get out of the truck. However, Coddington pulled Hunter back inside, displayed a knife, and tried to kiss her. Coddington held the knife at Hunter's throat and subsequently "poked her in the side" with it. Id. at 252. Coddington then told Hunter that he was going to have sex with her and taped her hands together. Hunter resisted and screamed for help.

Coddington then drove Hunter back to Mounts's residence. As Hunter exited the truck, Coddington told Hunter not to tell the police what had occurred. When Hunter went inside, Mounts noticed that she was crying hysterically. Hunter's face was bruised, she was holding her ribs and gasping for air, and she walked with a limp. Hunter also had scratches on her back and legs, and her knees and rib area were swollen.

Hunter told Mounts that Coddington tried to kill her as he held a knife to her throat. As a result, Mounts called 911 and reported the incident. Emergency personnel arrived at the residence and transported Hunter to the hospital, where she was examined. Thereafter, a physician prescribed pain medication for Hunter.

Coddington was arrested the next day and charged with the above offenses and with being a habitual offender. At a jury trial that commenced on November 13, 2007, the prosecutor asked Officer Lackey on direct examination whether Coddington had said anything to him at the time of arrest. Officer Lackey responded, "Not that I recall of any importance." Id. at 168. Officer Lackey also testified that Coddington "just sat there" and "did not say much." Id. at 169.

During the State’s closing argument, the prosecutor made the following comments regarding Coddington’s reaction at the time of the arrest: “What would your reaction be? Wow, I what? Silence. Some say silence is an admission.” Tr. p. 308. Thereafter, the prosecutor instructed the jury to find Coddington guilty of the charged offenses, adding: “I’ve never said this to a jury before, that it would be a travesty of justice if that’s not your verdict. . . . I’ve never questioned a jury, or bad mouthed a jury, or anything, that’s not my job. And I will . . . go along with whatever you decide.” Id. at 328. Finally, the prosecutor remarked: “Can you sit there and say, in good conscience, and truly believe after hearing the evidence that didn’t come from me, didn’t come from Mr. Coddington, it only came from this witness stand, can you . . . say to this community this person is not guilty?” Id. at 329.

Coddington’s counsel did not object to any of the prosecutor’s comments and, following the presentation of the evidence, the jury found Coddington guilty as charged. Coddington admitted to being a habitual offender and was subsequently sentenced to an aggregate term of thirty-nine years of incarceration. Coddington now appeals.

DISCUSSION AND DECISION

In addressing Coddington’s claim that he is entitled to a reversal because the prosecutor improperly commented on his post-arrest silence and requested the jury to return a guilty verdict, we initially observe that Coddington did not object to the comments, request an admonishment, or move for a mistrial. Therefore, his claims are waived. See Reynolds v. State, 797 N.E.2d 864, 868 (Ind. Ct. App. 2003) (holding that a

defendant waives appellate review of the issue of prosecutorial misconduct when he fails to immediately object, request an admonishment, and move for a mistrial).

In an effort to avoid waiver, Coddington claims that the prosecutor's comments amounted to fundamental error. When a claim of prosecutorial misconduct has not been properly preserved, the defendant must establish not only the grounds for the misconduct, but also the additional grounds for fundamental error. Hand v. State, 863 N.E.2d 386, 394 (Ind. Ct. App. 2007). Fundamental error is error that represents a blatant violation of basic principles rendering the trial unfair to the defendant, thereby depriving the defendant of fundamental due process. Davis v. State, 835 N.E.2d 1102, 1107 (Ind. Ct. App. 2005). Moreover, the error must be so prejudicial to the rights of the defendant as to make a fair trial impossible. Id. In determining whether a claimed error denies the defendant a fair trial, we consider whether the resulting harm or potential for harm is substantial. Id. The element of harm is not shown by the fact that a defendant was ultimately convicted. Id. Rather, it depends upon whether the defendant's right to a fair trial was detrimentally affected by the denial of procedural opportunities for the ascertainment of truth to which he would have been entitled. Id. at 1107-08.

We note that a criminal defendant has a fundamental constitutional right to exercise his or her Fifth Amendment privilege against compulsory self-incrimination without adverse inference or comment at trial. Hand, 863 N.E.2d at 396. Moreover, we have determined that the Fifth Amendment privilege against compulsory self-incrimination is violated when a prosecutor makes a statement that is subject to reasonable interpretation by a jury as an invitation to draw an adverse inference from a

defendant's silence. Id. The Fifth Amendment protects a defendant from having the prosecution make direct or indirect comments regarding his or her silence. Id.

As discussed above, the prosecutor asked Officer Lackey on direct examination about what, if anything, Coddington said at the time of his arrest. Tr. p. 168. The prosecutor then commented on Coddington's post-arrest silence and stated that silence could be construed as an admission. Id. at 169. We do not condone such conduct and find that the prosecutor's comments were inappropriate. However, it is apparent that the totality of the comments that the prosecutor made during closing argument were not focused on Coddington's silence. Indeed, the prosecutor's final argument consists of twenty-four pages in the transcript, and the portions of the record regarding Coddington's post-arrest silence appear only in a few lines. Id. at 296-314, 323-29. In other words, the prosecutor only briefly questioned Officer Lackey about Coddington's post-arrest silence, and the gravamen of his comments was that the evidence presented at trial supported the State's charges. Id. 168-69.

Indeed, our review of the record demonstrates that the State presented overwhelming evidence of Coddington's guilt. Hunter testified that Coddington struck her in the face and ribs. Id. at 247-49. Coddington then grabbed Hunter by the neck and forced her inside the vehicle as she tried to exit. Id. at 163, 230, 250-51. Thereafter, when Coddington stopped the truck again and Hunter attempted to exit, Coddington tried to kiss Hunter and brandished a knife that he held to her throat and side. Id. at 252. Hunter also testified that Coddington taped her hands together and attempted to have sex with her. Id. at 253.

We also note that Hunter's testimony about the incident and her injuries were corroborated when Mounts testified that she noted that Hunter was crying hysterically when she returned to the residence, observed the bruising on Hunter's face, and noticed that Hunter was holding her ribs while gasping for air. Id. at 208-09. Mounts also testified that she saw the scratches on Hunter's back and legs. Id. at 211, 256-57. Finally, the State's exhibits showed the extent of Hunter's injuries. Ex. 1A-1G.

In sum, while we find that the prosecutor's comments about Coddington's post-arrest silence were inappropriate, we cannot say that the statements rendered Coddington's trial unfair. Therefore, Coddington's claim of fundamental error fails. See Coleman v. State, 750 N.E.2d 370, 375 (Ind. 2001) (holding that in light of overwhelming independent evidence of a defendant's guilt, error made by the prosecutor during the closing argument is harmless).

Finally, notwithstanding Coddington's contention that the prosecutor's other comments warrant a reversal, it is apparent that the prosecutor was simply asking the jury to convict Coddington because he was guilty of committing the charged offenses. As a result, the prosecutor did not engage in misconduct. See Coleman v. State, 750 N.E.2d 370, 375 (Ind. 2001) (observing that it is misconduct for a prosecutor to request the jury to convict a defendant for any reason other than guilt).

The judgment of the trial court is affirmed.

VAIDIK, J., and MATHIAS, J., concur.